CIVIL RULE 90.3
COMMENTARY

I. INTRODUCTION

A. **Committee Commentary.** This commentary to Civil Rule 90.3 was prepared by the Child Support Guidelines Committee. The commentary has not been adopted or approved by the Supreme Court, but is published by the court for informational purposes and to assist users of Rule 90.3.

B. **Purpose.** The primary purpose of Rule 90.3 is to ensure that child support orders are adequate to meet the needs of children, subject to the ability of parents to pay. The level of support under the rule is comparable to the national average, but it is significantly above what had been a usual support award in Alaska. The increase was necessary to avoid the impoverishment of custodial parents and to minimize the public's burden of supporting children through the Alaska Temporary Assistance Program (formerly Aid to Families with Dependent Children program). However, the primary focus of the increase in support awards was to promote the welfare of the children who benefit from the support.

The second purpose of 90.3 is to promote consistent child support awards among families with similar circumstances. Third, the rule is intended to simplify and make more predictable the process of determining child support, both for the courts and the parties. Predictable and consistent child support awards will encourage the parties to settle disputes amicably and, if resolution by the court is required, will make this process simpler and less expensive.

The final purpose of 90.3 is to ensure that Alaska courts comply with state and federal law. AS 25.24.160(2) requires that child support be set in an amount which is "just and proper...." The Child Support Enforcement Amendments of 1984 (P.L. 98-378) and its implementing regulations (45 CFR 302.56) require states to adopt statewide guidelines for establishing child support. The Family Support Act of 1988 (P.L. 100-485) requires that the guidelines presumptively apply to all child support awards and that the guidelines be reviewed every four years.

C. **Scope of Application.** Rule 90.3 applies to all proceedings involving child support, whether temporary or permanent, contested or non-contested, including without limitation actions involving separation, divorce, dissolution, support modification, domestic violence, paternity, Child in Need of Aid and Delinquency. The support guidelines in the rule may be varied only as provided by paragraph (c) of the rule. Rule 90.3 applies to support of children aged 18 authorized by Chapter 117, SLA 1992, but otherwise does not apply to set support which may be required for adult children.

II. PERCENTAGE OF INCOME APPROACH

Rule 90.3 employs the percentage of income approach. This approach is based on economic analyses which show the proportion of income parents devote to their children in intact families is relatively constant across income levels up to a certain upper limit. Applications of the rule should result in a non-custodial parent paying approximately what the parent would have spent on the children if the family was intact.

Integral to the rule is the expectation that the custodial parent will contribute at least the same percentage of income to support the children. The rule operates on the principle that as the income available to both parents increases, the amount available to support the children also will increase. Thus, at least in the primary custodial situation, the contribution of one parent does not affect the obligation of the other parent.

III. DEFINING INCOME

A. **Generally.** The first step in determination of child support is calculating a "parent's total income from all sources." Rule 90.3(a)(1). This phrase should be interpreted broadly to include benefits which would have been available for support if the family had remained intact. Income includes, but is not limited to:

1. salaries and wages (including overtime and tips);

2. commissions;

3. severance pay;

4. royalties;

5. bonuses and profit sharing;

6. interest and dividends, including permanent fund dividends;

7. income derived from self-employment and from businesses or partnerships;

8. social security;

9. veterans benefits;

10. insurance benefits in place of earned income such as workers' compensation or periodic disability payments;

11. workers' compensation;

12. unemployment compensation;

13. pensions;
14. annuities;

15. income from trusts;

16. capital gains in real and personal property transactions to the extent that they represent a regular source of income;

17. spousal support received from a person not a party to the order;

18. contractual agreements;

19. perquisites or in-kind compensation to the extent that they are significant and reduce living expenses, including but not limited to employer provided housing and transportation benefits (but excluding employer provided health insurance benefits);

20. income from life insurance or endowment contracts;

21. income from interest in an estate (direct or through a trust);

22. lottery or gambling winnings received either in a lump sum or an annuity;

23. prizes and awards;

24. net rental income;

25. disability benefits;

26. Veteran Administration benefits;

27. G.I. benefits (excluding education allotments);

28. National Guard and Reserves drill pay; and

29. Armed Service Members base pay plus the obligor's allowances for quarters, rations, COLA and specialty pay.

Lump sum withdrawals from pension or profit sharing plans or other funds will not be counted as income to the extent that the proceeds have already been counted as income for the purposes of calculating child support under this rule (i.e., contributions to a voluntary pension plan).

Means based sources of income such as Alaska Temporary Assistance Program (ATAP), formerly Aid to Families with Dependent Children (AFDC), Food Stamps and Supplemental Security Income (SSI) should not be considered as income. The principal amount of one-time gifts and inheritances should not be considered as income, but interest from the principal amount should be considered as income and the principal amount may be considered as to whether unusual circumstances exist as provided by 90.3(c). Tax deferred dividends and interest earned on pension or retirement accounts, including individual retirement accounts, which are not distributed to the parent are not income. Child support is not income.

B. **Self Employment Income.** Income from self-employment, rent, royalties, or joint ownership of a partnership or closely held corporation includes the gross receipts minus the ordinary and necessary expenses required to produce the income. Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate. Expense reimbursements and in-kind payments such as use of a company car, free housing or reimbursed meals should be included as income if the amount is significant and reduces living expenses.

C. **Potential Income.** The court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A

determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent's work history, qualifications and job opportunities. The court shall consider the totality of the circumstances in deciding whether to impute income. When a parent makes a career change, this consideration should include the extent to which the children will ultimately benefit from the change. The court also may impute potential income for non-income or low income producing assets.

D. **Deductions.** A very limited number of expenses may be deducted from income. Mandatory deductions such as taxes and mandatory union dues are allowable.

Mandatory retirement contributions are a deduction. Voluntary tax-deferred contributions to a qualified employer sponsored plan or IRA may also be deducted, up to 7.5% of gross income, but only if the parent is not a participant in a mandatory plan.

Child support and alimony payments paid to another person arising out of different cases are deductible if three conditions are met. First, the child support or alimony actually must be paid. Second, it must be required by a court or administrative order. (Support which is paid voluntarily without a court or administrative order may be considered under Rule 90.3(c).) Third, it must relate to a prior relationship. A child support order for children of a second marriage should take into account an order to pay support to children of a first marriage, but not vice-versa. But see commentary VI.B.2.

A deduction also is allowed for the support of the children of prior relationships even if the party is the custodial parent of the "prior" children and does not make child support payments to the other parent of the children. In this situation support provided directly to the children is calculated by Rule 90.3 as if the children from the prior relationship were the only children.

Also, reasonable child care expenses that are necessary to enable a parent to work, or to be enrolled in an educational program which will improve employment opportunities, are deductible. However, the expense must be for the children who are the subject of the support order.

E. **Time Period for Calculating Income.** Child support is calculated as a certain percentage of the income which will be earned when the support is to be paid. This determination will necessarily be somewhat speculative because the relevant income figure is expected future income. The court must examine all available evidence to make the best possible calculation.

The determination of future income may be especially difficult when the obligor has had very erratic income in the past. In such a situation, the court may choose to average the obligor's past income over several years.

Despite the difficulty in estimating future income, a child support order should award a specific amount of support, rather than a percentage of whatever future income might be. The latter approach has been rejected because of enforcement and oversight difficulties.

IV. PRIMARY CUSTODY

A. **Generally.** "Primary custody" as this term is used in Rule 90.3 covers the usual custodial situation in which one parent will have physical custody of the child — in other words, the child will be living with that parent — for over seventy percent of the year. The shared custody calculations in paragraph (b) applies only if the other parent will have physical custody of the child at least thirty percent of the year (110 overnights per year). The visitation schedule must be specified in the decree or in the agreement of the parties which has been ratified by the court. **See also** commentary V.A.

The calculation of child support for the primary custodial case under 90.3(a) simply involves multiplying the obligor's adjusted income times the relevant percentage given in subparagraph (a)(2). (Normally, the portion of an adjusted annual income over $84,000 per year will not be counted. **See** Commentary VI.D.) As discussed above, the rule assumes that the custodial parent also will support the children with at least the same percentage of his or her income.

B. **Visitation Credit.** An obligor who exercises extended visitation, even if the visitation does not reach the thirty percent level of shared custody, probably will spend significant funds directly for the children during visitation. The parent with primary custody conversely will have somewhat lower expenses during the extended visitation even though that parent's fixed costs such as housing will not decrease. Consequently, 90.3(a)(3) authorizes the trial court, in its discretion, to allow a partial credit (up to 75% of total support for the period of extended visitation) against a child support obligation. In considering a visitation credit, the court may consider the financial consequences to the parties of the visitation arrangement and a credit. The court shall insure that support for the child, including contributions from both parents, is adequate to meet the child's needs while the child resides with the custodial parent. A visitation credit may be taken only if the extended visitation actually exercised exceeds 27 consecutive days and the court has authorized the specific amount of the credit. Nominal time with the custodial parent during the visitation period, including occasional overnights, does not defeat the visitation credit.

V. SHARED CUSTODY

A. **Generally.** “Shared custody” as this term is used in Rule 90.3 means that each parent has physical custody of the child at least thirty percent of the year according to a specified visitation schedule in the decree. “Shared custody” as used in 90.3 has no relation to whether a court has awarded sole or joint legal custody. “Shared custody” is solely dependent on the time that the decree or agreement of the parties which has been ratified by the court specifies the children will spend with each parent.

In order for a day of visitation to count towards the required thirty percent, the children normally must remain overnight with that parent. (Thirty percent of the overnights in a year total 110 overnights.) Thus, a day or an evening of visitation by itself will not count towards the total of time necessary for shared custody. Visitation from Saturday morning until Sunday evening would count as one overnight. However, the court may use another method of calculating the percentages of custody when counting overnights does not accurately reflect the ratio of expenditures by the parents.

B. **Calculation of Shared Custody Support.** The calculation of support in shared custody cases is based on two premises. First, the fact that the obligor is spending a substantial amount of the time with the children probably means the obligor also is paying directly for a substantial amount of the expenses of the children. Thus, the first step in calculating shared custody support is to calculate reciprocal support amounts for the time each parent will have custody based on the income of the other parent. This is done without regard to the reduction to the minimum obligation for an obligor below the federal poverty guidelines, or the $84,000 income cap. However, a parent’s annual support amount for purposes of this calculation will be a minimum of $600. The support amounts then are offset.

This calculation assumes that the parents are sharing expenses in roughly the same proportion as they are sharing custody. If this assumption is not true, the court should make an appropriate adjustment in the calculation.

The second premise is that the total funds necessary to support children will be substantially greater when custody is shared. For example, each parent will have to provide housing for the children. Thus, the amount calculated in the first step is increased by 50% to reflect these increased shared custody costs. However, the obligor's support obligation never will exceed the amount which would be calculated for primary

custody under 90.3(a), including appropriate adjustments allowed under paragraphs (c)(1)(B) and (c)(2) for reductions based on low or high income of a parent. The amount which would be calculated under 90.3(a) should include any appropriate visitation credit as provided by (a)(3).

C. **Failure to Exercise Shared Custody.** An inequity may arise under the shared custody calculation of support if the obligor does not actually exercise the custody necessary to make shared custody applicable (i.e., at least 30% of the time). If the obligor parent does not actually exercise sufficient physical custody to qualify for the shared custody calculation in the rule (at least 110 overnights per year — See Commentary, Section V.A), then (a)(2) of this rule will apply to the child support calculation. Failure to exercise custody in this regard is grounds for modification of support, even if the custody order is not modified. However, this provision may not be interpreted to allow the custodial parent to profit by denying visitation.

VI. EXCEPTIONS

A. **Generally.** Child support in the great majority of cases should be awarded under 90.3(a) or (b) in order to promote consistency and to avoid a tendency to underestimate the needs of the children. Nevertheless, the circumstances in which support issues arise may authorize courts to vary support awards for good cause.

The court may apply this good cause exception only upon proof by the parent requesting support be varied that there is clear and convincing evidence that manifest injustice would result if the support award were not varied. In addition, a prerequisite of any variation under 90.3(c) is that the reasons for it must be specified in writing by the court.

What constitutes "good cause" will depend on the circumstances of each cause. Three situations constituting "good cause" are discussed below in sections VI.B-D. These three specific exceptions are not exclusive; however, the general exception for good cause may not be interpreted to replace the specific exceptions. Absent unusual circumstances, 90.3(c)(1)(A), or the exceptions for low or high incomes, 90.3(c)(1)(B) and (c)(2), the rule presumes that support calculated under 90.3(a) or (b) does not result in manifest injustice.

B. **Unusual Circumstances.** 90.3(c)(1) provides that a court shall vary support if it finds, first, that unusual circumstances exist and, second, that these unusual circumstances make application of the usual formula unjust. Examples might include especially large family size, significant income of a child, health or other extraordinary expenses, or unusually low expenses. This determination should be made considering the custodial parent's income because the percentage of income approach used in Alaska tends to slightly understate support relative to the national average for cases in which the custodial spouse does not earn a significant income. This understatement relative to the national average becomes substantial if the custodial parent has child care expenses. The application of the unusual circumstances exception to particular types of factual situations is considered below.

1. *Agreement of the Parents.* The fact that the parties, whether or not represented by counsel, agree on an amount of support is not reason in itself to vary the guidelines. The children have an interest in adequate support independent of either parent's interest. Thus, approval of any agreement which varies the guidelines, whether in a dissolution, by stipulation or otherwise, must be based upon an explanation by the parties of what unusual factual circumstances justify the variation.

2. *Subsequent Children.* A parent with a support obligation may have other children living with him or her who were born or adopted after the support obligation arose. The existence of such "subsequent" children, even if the obligor has a legal obligation to support these children, will not generally constitute good cause to vary the guidelines. However, the circumstances of a particular case involving subsequent children

might constitute unusual circumstances justifying variation of support. The court should reduce child support if the failure to do so would cause substantial hardship to the “subsequent” children.

In addition, the interests of the subsequent family may be taken into account as a defense to a modification action where an obligor proves he or she has taken a second job or otherwise increased his or her income specifically to better provide for a subsequent family. This defense to an upward modification action should not be allowed to the extent that the prior support was set at a lower amount prior to the adoption of this rule, or to the extent that the obligor's increase in income is limited to ordinary salary increases.

In considering whether substantial hardship to “subsequent” children exists, or whether the existence of a subsequent family should defeat a motion to increase child support, the court should consider the income, including the potential income, of both parents of the “subsequent” children.

3. *Divided Custody.* The formula for shared custody described above was developed primarily for the situations in which the parents share custody of their only child, or the parents share custody of several children, but the children stay together. Custody of several children also can be divided so that at any one time one parent may have physical custody of one child and the other may have physical custody of the other children. Such an arrangement, depending on the circumstances, may require greater expenditures to support the children because it is somewhat less expensive to support children living together than in two households at the same time.

The first step in determining support in such a divided custody arrangement is to apply the usual shared custody formula in 90.3(b) by averaging the time all children will spend with each parent. For example, if one child will live with the father all of the time and two with the mother, support is calculated as if all the children spent one-third of the time with the father. The appropriate percentage figure for all the children (in the example, 3 or 33%) then is applied.

The second step in determining divided custody support is for the court to carefully consider whether the support amount should be varied under paragraph (c)(1)(A). A divided custody case should be treated as an unusual circumstance under which support will be varied if such a variation is “just and proper....”

4. *Relocation of Custodial Parent.* The relocation of the custodial parent to a state with a lower cost of living normally will not justify a reduction in support. The level of Alaska's guidelines is comparable to the national average. The fact that the obligor parent's income has in effect marginally increased relative to the children's living expenses simply enables the children to be supported at a slightly higher level.

5. *Prior and Subsequent Debts.* Prior or subsequent debts of the obligor, even if substantial, normally will not justify a reduction in support. The obligation to provide child support is more important than the obligation to fulfill most other obligations. However an obligor parent may attempt to present evidence which shows the existence of exceptional circumstances in an individual case.

6. *Income of a New Spouse (or other person in the household).* The income of a new spouse of either the custodial or obligor parent normally will not justify a variation in support. Either party may attempt to show that exceptional circumstances exist in a particular case. A parent who does not work because of the income of a new spouse (or other person in the household) may be assigned a potential income.

7. *Age of Children.* While the costs of raising children who are very young or who are over about ten years old are generally greater than raising other children, this in itself does not justify an increase in support. However, it should be considered in concert with other circumstances, and a parent always may seek to establish exceptional expenses in a particular case.

8. *Denial of Visitation.* A denial of visitation may not be countered with a reduction in support. See AS 25.27.080(c). Neither may non-payment of support be countered by a denial of visitation. Courts should use their powers to strictly enforce the visitation and custody rights of obligor parents.

9. *Property Settlement.* A parent may justify variation of the guidelines by proving that a property settlement in a divorce or dissolution between the parents provided one of the parents with substantially more assets than the parent otherwise would have been entitled to, that this inequity was intended to justify increasing or decreasing child support, and that this intent specifically was stated on the record. Any such change in monthly child support may not exceed the actual excess of the property settlement apportioned over the minority of the child.

However, courts should not approve in the first instance unequal property settlements which are meant to increase or decrease child support payments. "Property divisions are final judgments which can be modified only under limited circumstances, whereas child support awards can be changed periodically under much more liberal standards. One should not be a trade-off for the other." *Arndt v. Arndt*, 777 P.2d 668 (Alaska 1989)

10. *Overtime Income.* In most cases income from overtime or a second job will be counted as adjusted annual income under Rule 90.3(a). However, the court has discretion not to include this income when, for example, the extra work is undertaken to pay off back child support.

C. **Low Income of Obligor.** 90.3(c)(1)(B) provides that the guidelines do not necessarily apply if the obligor has a gross income below the federal poverty level. The applicable figure from the Federal Register is for the obligor alone, without regard to any subsequent family of the obligor. Subsequent children, and any income from a subsequent spouse, are relevant, if at all, only under 90.3(c)(1)(A) concerning the unusual circumstances exception.

Even if the obligor has an income of less than the poverty level, or no income at all, a minimum support of $50.00 per month applies. This $50.00 minimum support applies for all children, not to each child separately. The minimum level may be reduced under 90.3(a)(3) based on a visitation credit, or reduced under 90.3(b) based on the offset of the other parent's support obligation.

Reduction of support to $50.00 is not automatic. The court should consider such factors as the obligor's assets, the number of children and any other responsibilities and resources of both parents in deciding whether to reduce support to $50.00.

D. **High Income of a Parent.** Rule 90.3 provides that the percentages for child support will not be applied to a parent's adjusted annual income of over $84,000, unless the other parent is able to present evidence which justifies departure from this general rule. The factors which the court should consider in such a determination are specified in the rule.

E. **Retroactive Establishment.**

1. *Retroactive Establishment of Child Support*. It will sometimes be necessary for the court to establish support for a time when no complaint or petition for support had yet been served, and there was no other court or administrative order in effect. The court has determined that Civil Rule 90.3 applies to such calculations. *Vachon v. Pugliese*, 931 P.2d 371, 381-2 (Alaska 1996). However, in some circumstances unfairness may result from rigid application of the rule. The court should consider all relevant factors in such a situation, including whether the obligor was aware of the support obligation, especially if the obligor had children subsequent to that child. See also Commentary VI.B.2.

__2. *Retroactive Application of Amendments*. When establishing support prior to the service of

a complaint or petition, the court should apply the most current version of the rule, except for portions of the rule which may have been adjusted for inflation. This is based on the fact that Civil Rule 90.3, unlike most other court rules, is interpretive. The most current version of the rule is presumably the most refined interpretation to-date of the statute calling for fair and equitable child support awards. As an example, the credit for prior children living with the obligor was not found in early versions of the rule, but nonetheless should be applied when support is being established. However, there are portions of the rule which were adjusted for inflation, such as the increase in the minimum support obligation from $40 to $50, and the increase in the income cap from $60,000 to $84,000. With regard to those portions of the rule, the court should apply the version of the rule which was in effect in the month for which support is being calculated.

VII. HEALTH CARE COVERAGE

A. Health Insurance

Rule 90.3(d) requires that the court address coverage of the children's health care needs including expenses not covered by insurance. The court must require health insurance if the insurance is available to either party at a reasonable cost. The health insurance will be paid by the party to whom it is available. However, the court must allocate the cost of insurance between the parties. Note that the cost to be allocated is limited to that portion of the total cost necessary to insure the children involved — not the parent, the parent's new spouse or children of another relationship. If the insurance for the children also covers other members of the purchaser's family, and evidence is unavailable on the specific cost of insuring only the children subject to the order, the cost of covering the children must be determined by allocating the total cost of coverage pro rata among all covered family members. See *Rusenstrom v. Rusenstrom*, Op. No. 5130 (Alaska, June 4, 1999).

The allocation of the cost of the children's insurance between the parents should be 50/50 unless the court finds good cause to change that percentage. A substantial difference in the parties' relative financial circumstances may constitute good cause. The rule requires the court to adjust child support either upward or downward to reflect the allocation. Paragraph (h)(1) provides that payments for health care insurance are included in deciding whether there has been a 15% change in support which constitutes a material change of circumstances.

B. Uncovered Health Care Expenses

Rule 90.3(d)(2) provides that the court also allocate reasonable health expenses not covered by insurance. The rule requires the party who did not obtain the health care to reimburse the other party within 30 days of receiving the necessary paperwork. The paperwork should include the medical bill, payment verification, and, if medical insurance applies, an insurance statement indicating any uncovered health care expenses. These materials should be sent to the other party within a reasonable time. The rule should be read to require prepayment of allowable uncovered medical cost when prepayment is required by the health care provider.

The rule provides that the usual 50/50 presumption does not apply for any amount in excess of $5,000 per calendar year. In such a situation, the excess expenses should be allocated based on the parties' relative financial circumstances during the approximate time period when the expenses occurred.

C. Definition of Health Care Expenses

Paragraph (f) defines health care expenses to include medical, dental, vision and mental health counseling expenses.

VIII. CHILD SUPPORT AFFIDAVIT AND DOCUMENTATION

Each parent in a proceeding involving a determination of child support must provide the court with an income statement under oath. The rule also requires that the income statement of a parent be verified with documentation of current and past income. Suitable documentation of earnings might include paystubs, employer statements, or copies of federal tax returns. The income statement, with documentation, must be filed with the party's first pleading in the action. This first pleading is the dissolution petition in a dissolution, the complaint or answer in a divorce, the custody petition or response in a child custody case under AS 25.20.060, or the motion or opposition in a motion to modify child support or motion to change custody. The court may impose sanctions on a party who does not timely file the income statement with appropriate documentation. The rule repeats language set out in Civil Rule 95(a). In a default case the court must decide support on the best available information, but should require the present party to make reasonable efforts to obtain reasonably accurate information.

Income affidavits must be filed even by a parent whose income is not presently being used to calculate child support. That parent’s income may be relevant if there is a request by either parent for a variation under subsection (c), or it may be needed to determine what percentage of uncovered health care expenses each parent will pay under subsection (d)(2) or how much of travel expenses each parent will pay under subsection (g). In addition, the court may wish to enter an order which automatically shifts the child support obligation if a child changes his or her primary residence, as permitted under *Karpuleon v. Karpuleon*, 881 P.2d 318 (Alaska 1994).

IX. TRAVEL EXPENSES

The court shall allocate any travel expenses that are necessary to exercise visitation. This allocation should generally be done on a percentage basis because the actual costs may not be known or may change. The court should take care that its allocation of these expenses does not interfere with a parent's ability to provide the basic necessities for the children.

X. MODIFICATION

A. Material Change in Circumstances.

Alaska law allows the modification of support orders upon a material change in circumstances. A significant amendment to Rule 90.3 constitutes a material change in circumstances pursuant to AS 25.24.170(h). 90.3(b) presumptively defines a material change in circumstances, whether based on a change in the parties' incomes or a significant amendment to the rule, as whenever the change would result in an increase or decrease of support under the rule of at least 15%. However, a support order can provide that the support obligation will be adjusted without further order of the court upon a change of health insurance costs and notice of the change to the other parent (and CSED if CSED is handling collections).

See *Flannery v. Flannery*, 950 P. 2d 126 (Alaska 1997), concerning what constitutes a material change of circumstances when the parties by agreement originally set support at a level higher than would have normally been required under Rule 90.3.

A temporary reduction in income normally will not justify an ongoing modification reducing child support. However, a temporary, unforeseen, and involuntary reduction in income may justify a temporary

reduction in support subject to the retroactivity provisions in Rule 90.3(h)(2). In considering such a reduction, the court should consider the needs of the children, the ability of the other parent to provide support, liquid assets available to provide support, and the future earning capability of the obligor parent. See *Flannery v. Flannery*, 950 P. 2d 126, 133 (Alaska 1997); *Patch v. Patch*, 760 P. 2d 526, 530 (Alaska 1988).

Federal law, recognized in AS 25.24.170(b) and 25.27.193, appears on its face to require allowing modifications every three years without a showing of a material change in circumstances. See 42 U.S.C. 666(a)(10)(A)(iii). However, in response to questions from states, the federal Office of Child Support Enforcement has stated (in Action Transmittal OCSE-97-10, pages 28-31) that existing regulations which allow reasonable quantitative standards for modifications (such as Alaska's 15% standard) continue to apply.

B. No Retroactive Modification.

The Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, Section 9103(a) (the Bradley Amendment), prohibits retroactive modification of child support arrearages. Rule 90.3(h)(2) is intended to restate this prohibition, including the exception allowed by federal law for modification during the pendency of a modification motion. Pursuant to this rule, the notice of petition for modification sent by the Child Support Enforcement Division triggers the legal process for modification of child support awards and thus an increase or decrease of support back to the date of this notice does not constitute retroactive modification.

The prohibition against retroactive modification limits both requested decreases and increases in child support. **See** Prohibition of Retroactive Modification of Child Support Arrearages, 54 Fed. Reg. 15,763 (1989). Thus, either the custodial or the obligor parent should promptly apply for a modification of child support when a material change in circumstances occurs.

See Section VI.B.2 of the commentary as to the extent support of a "subsequent" family may be used as a defense to a modification action to increase child support.

C. Preclusion.

Illinois courts have applied the doctrine of equitable estoppel to mitigate the sometimes harsh effect of the rule against retroactive modification. *In re Duerr*, 621 N.E. 2d 120 (Ill. App. 1993); *In re Michael*, 590 N.E. 2d 998 (Ill. App. 1992); *Johnston v. Johnston*, 553 N.E. 2d 93 (Ill. App. 1990); *Strum v. Strum*, 317 N.E. 2d 59 (Ill. App. 1974). The doctrine does not allow retroactive modification, but it can in limited and appropriate cases limit collection of a support arrearage. It also may be applied to limit arrearage enforcement by a parent's assignee such as the child support enforcement agency of this or another state. Clear and convincing evidence is required to support a finding of equitable estoppel.

Rule 90.3's preclusion provision limits application of this principle to cases in which the obligor assumed primary custody of a child for the time period for which the obligee now attempts to collect support. Also, the time period must exceed nine months. The application of preclusion would not be appropriate when the proportions of shared custody changed or even when an arrangement originally conceived as primary custody changed to shared custody. Further, preclusion would apply, as equitable estoppel does in Illinois, only when the obligor assumed primary custody of all the children on which the support obligation is based.

As an alternative to preclusion, AS 25.27.020(b) may allow a reduction of support owed to the other parent when the obligor assumes custody of one or more of the children. See *State v. Gause*, 967 P.2d 599 (Alaska 1998).

XI. THIRD PARTY CUSTODY

A. Support Owed to the Third Party

If the state or another third party entitled to child support has custody of all of a parent's children, child support is calculated in the same way as it would be calculated in other cases. In other words, support is equal to the parent's adjusted annual income multiplied by the relevant percentage in paragraph (a)(2) based on the number of children.

However, this basic calculation does not work when the state or other third party has custody of only some of a parent's children. In this case, the rule provides that the total support calculation (as calculated for the total number of the parent's children) be reduced to only the proportion of the parent's children of whom the third party has custody. For example, the third party might have custody of two of a parent's three children. Support would be calculated as the parent's adjusted annual income, multiplied by .33 (the relevant percentage for three children), multiplied by 2/3 (the third party has custody of two of the parent's three children). Note that the calculation only takes into account children which are either in third party custody, substantially supported by the parent or living with the parent. A child of the parent, for example, living with a relative without substantial support would not be counted in the above calculation.

The deduction for prior children in (a)(1) (B) and (C) would not apply because these children are already taken into account as children living with or supported by the parent.

B. Support Owed Between the Parents

There will be instances when a third party is entitled to support for some of the parent's children, but one or both parents retain primary or shared custody of their remaining children. In this case, child support between the parents should be calculated using Rule 90.3 based on the pro rata support percentages for the children not in third party custody. After that calculation, any support owed may be offset with amounts owed under 90.3(i)(1) to minimize transactions.

For example, a father might have custody of two children and the mother's sister might have custody of, and be entitled to support for, the parents' third child. Both parents in this example have a $45,000 adjusted annual income. Under Rule 90.3(i)(1), the sister is entitled to $4,950 per year from the father [$45,000 (annual income) x 33% (percentage for three children) x 1/3 (custodian has one of three children)]. The sister also is entitled to the same amount from the mother. (The parents' incomes are the same and the mother supports the children living with the father.)

The pro rata percentage for each child under 90.3 (a)(2) would be 33% (three children) ÷ 3 or 11% per child. Under 90.3(i)(2), the mother owes the father $9,900 per year in support ($45,000 x 22%). If the support amounts are offset, the mother will owe her sister $9,900 per year and the father $4,950 per year. The court could decide, however, that it was preferable not to offset the support amounts because one of the parents might not pay the third party.

XII. SUPPORT ORDER FORMS

Paragraph (j) was formerly Civil Rule 67(b).

XIII. DEPENDENT TAX DEDUCTION

Waggoner v. Foster, 904 P.2d 1234 (Alaska 1995), provides that tax deductions for the children should

be allocated based on the child's best interests. AS 25.24.152 places some limits on giving the deduction to the parent with less physical custody. Federal income tax law also may limit who can take the deduction.